



## A CRITICAL ANALYSIS OF SAME-SEX MARRIAGE IN INDIA

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**BEST CITATION** – ADITYA CHAUDHARY, A CRITICAL ANALYSIS OF SAME-SEX MARRIAGE IN INDIA, *ILE WEEKLY REVIEW (ILE WR)*, 1 (3) OF 2023, PG. 38-45, APIS – 3920 – 0037 | ISBN – 978-81-964391-3-2.

### **Abstract**

*The fight for equal rights and recognition of homosexuals continues in India. The concept of homosexuality exists in Indian mythology but not in India and homophobia still exists in Indian society. The stigma surrounding homosexuality is a result of the culture and morality people follow and the way people view homosexuality. Although the recognition of homosexuality in our law is a step towards the recognition of gay rights, it is only the beginning of the struggle for equality. Culturally, Indians views on sexuality have not changed. Human rights are the fundamental rights of all people. It is present in all people regardless of race, sex, religion, language, gender or colour. The right to life, freedom, equality and personal dignity are recognized in the Constitution or incorporated into international treaties and enforced by the Government of India. Finally, In 2018 Navtej Singh Johar has brought hope to the LGBT community, which has long fought for their own rights against LGBT people.*

### **Keywords:**

Same-Sex Marriage, Special Law, Adoption, Discrimination, Sexual Orientation

### **Introduction**

Whenever we talk about human and civil rights, same-sex marriage is accepted in many developing countries. The third woman had suffering from Gender Discrimination. They fight for their rights. Legislation must be enacted to protect same-sex relationships on an equal footing with heterosexuality. The right to marry is recognized as a human right. However, there is no law or enforcement of this right for trans people. They saw hope when the Supreme Court ruled against NALSA. This is the first attempt to legally recognize their gender and support everyone, regardless of who they are. Marriage is accepted as an important part of human life in terms of politics, law and health. It is a legal body that relies on many personal laws to recognize the relationship between two parties. It is of public importance as it relates to rights and responsibilities such as property, inheritance and related rights. These rights

come from marriage. In today's world, the institution of marriage is not just a civil right, it is recognized all over the world. The right to marry is a right that comes from the state. India's marriage laws are now considered constitutional and give people the freedom to choose their spouse. **Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.** have decided that Article 21 is about freedom and liberty, not material life, but a life filled with integrity, dignity, and virtue. Human dignity is a prerequisite for the recognition of the rights enshrined in Article 21 of the Constitution. The right to marry is so important for the protection and continuation of human dignity that courts see marriage as a fundamental right in Article 21 of the Constitution. Although the right to marry as they wish is seen as an important right, the current situation does not allow homosexuals to exercise this right. The LGBT community also faces difficulties in exercising

its most basic rights. Lawmakers made no effort to guarantee basic marriage rights. Laws in many countries recognize same-sex marriage and provide legal and social protection for same-sex couples. Many gay benefits, such as pensions, inheritance rights and pensions, do not apply to same-sex couples. **Suresh Kumar Koushal v. Naz Foundation** (hereinafter referred to as Koushal) is a case against crime under Section 377 of the Indian Penal Code. This post is not about what homosexuals are and what they are, but about the importance of being gay. It is undisputed that discrimination based on gender violates our fundamental rights under Article 15. Sex discrimination. Existing special laws only recognize same-sex marriage and deny the reality of the advantages and benefits these laws provide to married couples. The article concludes that changing a person's right to legalize same-sex marriage is not a viable option as it would destroy the nation's religion. Therefore, a good way to recognize the rights of homosexuals is to change the private marriage law. For this reason, it can be said that banning same-sex marriage is a violation of human rights and unfair discrimination against LGBT (sex, gender, person changes). The struggle of the LGBT community to realize their rights and fight discrimination in society is long and difficult. Most countries have achieved the important goal of passing laws determining whether same-sex relationships are consensual or illegal. But about 76 countries in West Asia and Africa still use this law. India joined them when the Supreme Court upheld the validity of Section 377 of the Indian Penal Code in the Koushal case. **Nazi Foundation v. Government of NCT of Delhi** (hereinafter referred to as Naz Foundation) has been ordered by the Delhi High Court to consider adult sex. Article shows that the legalization of same-sex marriage is not sufficient to recognize and release homosexuals, and that legislation supporting this should continue. It also shows the various options available for authentication. Because this is not just a legal issue, it is an important legal issue that affects the private life of many

people. In countries like India, support and maintenance strategies have evolved with modernisation. Thus, struggle stems from cultures, traditions, beliefs and practices that impede freedom. The claim of the Naz Foundation was dismissed by the Delhi High Court as it was non-academic and factual. He then requested a new hearing, which was later rejected by the Supreme Court. So think of Koushal, that shouldn't mean the path is impossible.

### **Homosexuality in the Indian perspective**

Homosexuality can be defined as homosexuality or a relationship between two people of the same sex. Having sex with gay partners is absolutely unacceptable. Scientists have done a lot of research to find the answer to the question of why people have sex. Many biological studies have shown that a person's desire for sex is influenced by genetics or the environment of the early womb, or both. Research has shown that this is a natural change and one that is not under human control. But even in the 21st century, there are very poor people living in society. has been considered taboo in India since ancient times. Personal laws often define marriage as the union of two pure and different souls. Homosexuality is considered immoral and a violation of culture and religion. Same-sex marriage is considered unclean as marriage is a private institution controlled by religious organizations. Most Indians see it as part of western culture, a bad foreign influence. But not in the West, because our classics and ancient literature have some similar ideas. The Rig Veda, one of the holy books of Hinduism, speaks of "Vikriti Evam Prakriti", which means that time is natural.

### **Same-Sex marriage in India: History**

According to the Indian government, they are trying to open up the LGBTQ community. Fighting for gay rights is not an idea in India, it has been around since 1861. The UK government has issued Section 377 for the first time in India.

Section 377 of the Sodomy Act of 1533, created by Thomas McCauley in 1838 and published in 1860, defines "leadership" as sexual intercourse incompatible with God and man. A few years ago Section 377 was problematic because it was difficult for both parties to come to terms. As a result, the Naz Foundation filed a petition in the Delhi High Court in 2001 challenging its legal status and asking the court to uphold its decision to allow same-sex marriage with adults. However, this request was rejected in 2003 because the Naz Foundation had nothing to do with the issue. As the Naz Foundation was not satisfied with the court's decision, it went directly to the Supreme Court of India for a retrial. Later, Naz Foundation v. State. NCT-based Delhi argues that Article 21 of the right to life and liberty includes the rights to respect and privacy against homosexuality. They said that Section 377 also violates article 14 of the constitution, which makes sex a crime. Article 15 of the Indian Constitution prohibits discrimination based on sex. Gender isn't just gender, gender is what parents think. Discrimination based on homosexuality is illegal. Finally, the court changed the law with the decision of Section 377. After Naz's trial, many people demanded SK's decision. **Suresh Kumar Kosha v. The Naz Foundation** Supreme Court declared that "the law has the power to interfere with or change the existing law" and declared it "illegal". Later, MP Shashi Tharoor announced a special law on sexual crimes in 2015. However, the lower house voted against the bill, according to BJP. In 2016, the LGBTQ filed five complaints that Section 377 violated three fundamental rights: the right to have sex, the right to choose a partner, the right to life, the right to parenthood, and sexual freedom. legislation. **Navtej Singh Johar V. Union of Law and Justice Ministry of India**, Supreme Court confirmed the evidence in 2018. The court said it was illegal to have sex with a person because it was a crime under Article 14. Therefore, according to Indian law, the right to choose a spouse belongs to the person whose rights are protected by fundamental rights..

### Current Scenario

However, gender discrimination did not disappear after the entry into force of Section 377 of the Indian Penal Code. A case is currently pending in the Delhi High Court involving 3 same-sex couples who demanded the court to declare that the SMA<sup>27</sup> and FMA<sup>28</sup> apply to all couples regardless of gender. In short, seek legal recognition and registration of same-sex marriage. Centre opposes the assertion that a wedding or marriage cannot be said to be a relationship. The Central Opposition claims:

#### The concept of homosexuality is incompatible with Indian society –

Social virtue is not enough in Indian society because people are not ready to accept the limits of the gay family.

#### Not systematically coded –

Same-sex marriage is not recognized or approved by any written or legal act or regulation.

#### Questions about personal rights-

The right to privacy is a fundamental right and any such interference will affect existing privacy rights. Registration of same-sex or same-sex marriage is not restricted or interferes with existing rights, and is also prohibited. For example: "Marriage Law" under Personal Law. **Navtej's Singh Johar** case did not extend the right to privacy to include the right to same-sex marriage as a fundamental right. Misleading Law Any interpretation of other than male biology and female biology would make the practice illegal. In case of same-sex marriage, the name of the couple cannot be called according to the current law.

#### Is marriage necessary?

"Marriage is the union of two souls, & Soul has no Gender."<sup>29</sup>

<sup>27</sup> The Special Marriage Act, 1954

<sup>28</sup> The Foreign Marriage Act, 1969.

<sup>29</sup> Paras Sharma, The Unanswered Question of Same-Sex Marriages in India, JURIST, (Oct 19, 2020, 11:30:20 PM),



Everyone in this world needs someone to guide them in life. Gender is something the human body can have. Marriage is called the union of two souls and each soul is considered a gender. You cannot understand the meaning of marriage without getting married. But here are a few points that clearly show why marriage is necessary.

### **Hostages of Emotion and Being:**

Marriage is a relationship where you always have someone to take care of you. No matter what you do, your other half will always be by your side, which shows this relationship.<sup>30</sup>

### **Encourage your understanding:**

This connection strengthens your commitment because it gives you someone who can take away all your negative feelings and a good friend you can talk to about whatever you want, yes.

### **Violation of fundamental rights**

The rights of the LGBTQ community have long been restricted. They face many problems, especially in a country like India where many people are considered foreigners. As we all know, in our country the law is above other laws and breaking the law, therefore breaking FR (here it is called law) is liable as Indian crime. Articles 14, 15(1), 19(1)(a) and 21 are violated here.

#### **1) Right to Equality:**

Article 14 of the Indian Constitution deals with the right to equality before the law and to equal protection. He said that the state should protect all person equally<sup>31</sup>. The third wife is always considered immoral and sinful in society. The right to equality has long been violated because the LGBTQ community is not entitled to gender recognition as part of society, but not in India. The law gives them the right to have

children from pregnant women or members of pregnant women.

#### **2) Right Against Discrimination:**

Article 15(1) of the Indian Constitution prohibits discrimination on the basis of religion, caste, caste, gender and place of birth<sup>32</sup>. In 2014, the Supreme Court of India ruled that transgender people should be recognized as a third gender, rejecting the notion that a Gender identity can lead to discrimination<sup>33</sup>.

#### **3) Right to Freedom of Speech and Expression:**

Article 19(a) of the Constitution of India deals with freedom of expression and expression and clearly states that people have the right to express their sexuality or opinions<sup>34</sup>. This right is violated because LGBTQ people are denied the right to marry and are seen as a sin rather than an expression of identity.

#### **4) Right to privacy:**

Article 21 of the Indian Constitution refers to the right to privacy and personal freedom while the right to live with dignity refers to the right to have sex with and with whom. But the LGBTQ community is dissatisfied with all these rights when advocates and legislators begin to question the recognition of gay men.

### **Whether same-sex marriage is possible in India?**

Same-sex marriage is illegal in India and parental rights such as public schools (private rights or responsibility of married parents) and joint families (marriage with the same effect) are violated. Haryana courts ruled in 2011 to allow same-sex marriage between two women, but it remains illegal<sup>35</sup>. Since the Supreme Court's final decision in 2018, many

<https://www.jurist.org/commentary/2020/10/paras-sharma-india-same-sex-marriage/>.

<sup>30</sup> Sylvia Smith, Why Is Marriage Important – 8 Reasons Revealed, Marriage.com, <https://www.marriage.com/advice/relationship/why-is-marriage-important/>.

<sup>31</sup>India Constitution Art 14.

<sup>32</sup> India Const. Art 15 (1)

<sup>33</sup> National Legal Service Authority (NALSA) v. Union of India (UOI), (2014) 5 SCC 438 (India).

<sup>34</sup> India Constitution Art 19 (a).

<sup>35</sup> Dipak Kumar Das & Sanjay Yadav, In a first, Gurgaon court recognizes lesbian marriage, The Times of India (TNN), <https://m.timesofindia.com/city/gurgaon/in-a-first-gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms>.

homosexuals have asked the Parliament to register their marriages, but Halkbank refused, citing crime. Don't believe we should expect people and governments to embrace this idea, but we shouldn't be embarrassed because there are still many types of same-sex marriage that can help.

### Same-sex marriage under various personal laws in India

#### 1) The Hindu Marriage Act, 1955

The Hindu Marriage Law regulates marriage, divorce and other relationships between two people who practice Hinduism. Others practice Jainism, Buddhism or Sikhism in India. By law, marriage in Hinduism is considered a divine origin, a sacred union of two people fulfilling their religious obligations. In the current environment, same-sex marriage is often seen easier than individual rights. Hindu marriage law states that at the time of marriage the groom must be at least 21 years old and the bride at least 18 years old. There is a similar rule in Christian marriage law, where the words man and woman are used. Almost all Indian laws recognize marriage as a same-sex union. However, Hindu marriage laws do not explicitly prohibit same-sex marriage. Some of these recognized as a person's right include: Existing laws can be interpreted to allow same-sex marriage. LGBT (Lesbian, Gay, Bisexual and Transgender) can be defined as a diverse community whose customs allow same-sex marriage. Explain that the law allows same-sex marriage unless otherwise required. Finally, significant changes were made to the law itself. Rule is gender neutral and only applies to the terms bride and groom. Same-sex marriage is allowed if one party (in a same-sex couple) identifies as the groom and the other as the bride. In one example, a heterosexual couple follows the same path, one calling himself the groom and the other the bride. Although the terms used (bride and groom) defy interpretation rules and common sense, these terms attempt to reconcile same-sex marriage with the other spouse. The second approach is

to see the LGBT community as a separate community with its own customs and practices that allow same-sex marriage. Anti-Brahman and Arya Samaj took a similar approach. They started the age of self-respect and formed their own marriages and cultures. Section 7A became law when the Act was amended in 1967 to add Section 7A. A third way is to interpret the law to allow same-sex marriage. Otherwise, the law will be deemed unfair as it discriminates based on gender and takes away their rights. This claim was upheld by the Delhi High Court in the Naz Foundation case. After Koushal, however, the Court did not change enough to support this view. **Bombay State v. The Narasu Appa Mali** Bombay High Court ruled that fundamental rights cannot be used to test personal rights. The last way is to change the personal rules. It is the most effective of all the above solutions. However, it is still the most difficult and controversial because some sections of society do not approve of the behavior of the LGBT community. So, without change, can same-sex marriage take place under current law?

#### Under Special Marriage Act

The Special Marriage Act 1954 allows parties that do not wish to abide by the rules of private marriage, regardless of religion or belief. Another option that should not lead to religious discrimination is to change some laws to support same-sex marriage. Unlike marriage under the Hindu Marriage Act, this Act does not require any religious and cultural rites. However, since the rule uses the words "male" and "female" to describe age, it is now only used for the same gender. For same-sex marriage to become law, Section 4(c) must be amended or a special provision added to allow same-sex marriage. At the same time, reform, which is difficult due to the current BJP government, is the best option. Although both Congress and CPI(M) voted in the Lok Sabha elections, the BJP supported the party leader's statement that homosexuality is wrong and unsupportable. Many countries now have laws that allow

same-sex marriage. The Netherlands became the first country to legalize same-sex marriage in 2001. However, there are also many anti-gay laws. The South African Constitutional Court has ruled that same-sex marriage violates their constitutional rights. As stated in paragraph 3 of Section 9 of its Constitution, "The State cannot directly or indirectly prohibit discrimination, homosexuality, age, disability, religion, opinion, belief, culture, language and birth. stating that gender is also included, the court referred to the fact that many foreign courts are in the judicial process to support the above statement. evidence. Same-sex relationships laws and restrictions violate Article 15 on grounds of discrimination against same-sex couples. In other words, it can be understood at a glance whether same-sex marriage is allowed under the divorce law. However, the decision of **the Suresh Kumar Koushal v. Naz Foundation** can be used to prove the legality of the Private Marriage Act as proclaimed after the constitution. legislation. Lawsuits have been filed to protect the rights of gay workers after the Supreme Court overturned Section 377 of the Indian Penal Code. Shakti Vahini v. Union of India Courts have ruled that the right to choose a spouse is a fundamental right. Therefore, there is no reason to prohibit same-sex marriage without understanding the needs and feelings of same-sex couples. It cannot change the existing rules and there are no separate rules to solve these problems.

### **The Muslim Personal Law**

According to the Muslim Law, marriage is sexual intercourse whose ultimate purpose is "creation". Homosexuality is prohibited in Islam, death, imprisonment etc. punished and considered a sin. However, he said that sex is not completely forbidden because it has no clear meaning, it is just an exclusion. Divorce laws and ideas like "Muslim women". As a result, there have been some recent changes or changes in the private law regarding marriage for the LGBTQ in the Islamic community, as well as on the issue of husband and wife.

### **Do LGBTQ couples have parental rights?**

"Mother and father are the best examples or spouses of God. There is no one who supports, understands, loves and helps more than Him in every word, deed and in every action." A couple in India. Adopting a child from outside the LGBTQ community has rights and privileges. The LGBTQ community has no right to do so, even if there are no laws, regulations, rules or other regulations that give them rights. Legal recognition of this community is still an issue in Indian society which seems very strict on rules.<sup>36</sup> According to UNICEF report, there are 29.6 million orphans and abandoned children in India in 2018 and this number will increase to 31 million by 2020. Not a gay parent, love and affection are preserved. Children need someone to listen and understand what is going on there but Indians have negative thoughts, feelings, emotions etc. , mental illness, etc. Who says women can't be parents? As long as they are good parents, there is no difference between men and women.

### **Can same-sex couples be good parents?**

Parents are always parents, whether it's dad, mom, or LGBTQ, their gender doesn't determine how they feel about their kids. Personal opinions aside, there are even studies comparing gay and straight parents and concluding that there is no difference between gay and straight parents. Their children receive the same health and education as any other child in the community. One of India's prime examples of healthy parenting is trans activist Gauri Sawant, who adopted a daughter after her mother died at the age of 16. So the ratio This limit makes it clear that sex or happiness should not justify parental rights.

### **Paving the way for LGBTQ rights in many countries**

#### **1) Canada**

It was the Clippert case that sparked the idea of legalizing same-sex marriage in Canada.

<sup>36</sup> <https://legodesk.com/legopedia/same-sex-marriage-laws/>.



Everett is the last person to be imprisoned for gay marriage. The document contains discrimination against the LGBTQ community. Soon after, same-sex marriage was legalized in Canada under the 2005 Marriage Act. In Canada, transgender people can choose their race and gender as "X" reached. Proof of Canadian passport. The report notes that the LGBTQ community has widespread support among Canadians, particularly in places like Vancouver, Toronto, Montreal and Ottawa. In fact, Montreal is the "gay city".

## 2) Spain

The country has been targeting the LGBTQ community since the early 1900s. Homosexuality was legalized in 1979, same-sex marriage in 2005, and adoption laws. Even the Pew Research Centre estimates that about 90 percent of the public think the LGBTQ community is accepted. Spain has been described as the world's most welcoming place for the LGBTQ community.

## 3) The Netherlands:

We all know that this country was one of the first to legalize same-sex marriage. This was when the French attacked Dutch territory and through the Napoleonic Wars, which abolished all racial discrimination and legalized same-sex marriage. After the rapid recognition of the rights of the LGBTQ community in the 20th century, the idea of homosexuality was eradicated in 1973.

## 4) The United Kingdom:

Homosexuality was legalized in the UK between 1967 and 1982. Protecting LGBT people in 21st century Britain. Allowing LGBTQ people to change the law and serve in the military. While civil unions are allowed in Northern Ireland, same-sex marriage is legal in Wales, England and Scotland.

## 5) Finland:

Finland has taken an important step in recognizing the rights of the LGBTQ community. In 2014, the Finnish parliament passed same-sex marriage laws. In addition, there are many

anti-discrimination measures for LGBTQ people. Trans people can legally change their gender and homosexuals can openly serve in the military.

## 6) Belgium:

Homosexuality was legalized in Belgium in 1975, with the exception of 1965 and 1985. In 2003, Belgium became the second country in the world to legalize same-sex marriage. Organ transplantation was legalized in the country in 2006, and gay women can have IVF. La D mence is Belgium's international gay pride festival. Apart from Pride Week, Brussels is one of the cities in Belgium with a growing LGBT community.

## Landmark Judgment on Same-Sex Marriage in India

### 1) Naz Foundation Government. V. NCT of Delhi

Freedom, dignity and privacy left him in 2001 under Section 377 of the IPC police when an NGO called the Naz Foundation raided a public place in Lucknow and arrested a man who believed he was gay. This violates Article 21 of the Indian Constitution. punished by art. It also ruled that Section 377 of the IPC violates Article 14 of the 1950 Constitution of India which states that all people are equal and not subject to discrimination. However, this decision was opposed by many who believed that it was not in line with the morals of Indian society. This eventually led to the establishment of **the Suresh Kumar Kaushal V. Naz Foundation** Thus, in 2013, the Supreme Court of India announced that gender discrimination issues would be heard in the Delhi High Court.

### 2) K.S. Puttaswamy V. Union of India

The court decision against the **Suresh Kumar Kaushal V. Naz Foundation** was overturned in 2018. In this historic decision, the Supreme Court said that privacy is one of the fundamental rights of human life. The right to privacy is an important part of the right to life and freedom and requires freedom of choice, including Gender. The

court also said that it is not appropriate to discriminate against others because of their sexual orientation. In the case of **Suresh Kumar Kaushal V. Naz Foundation**, the court said that Section 377 of the IPC affected very few people and therefore refused to punish homosexuality. Now, however, the question has been reversed, arguing that truth should not be given to most opinions. The Supreme Court's decision on the case is an important development in India's gay struggle.

### 3) **Navtej Singh Johar V. Union of India**

The writ petition was filed by five people of the LGBT community appealed for Section 377 of the IPC to become law. The Supreme Court has since conducted a litmus test for the effectiveness of Section 377. The test is whether Section 377 is compatible with Articles 14, 19 and 21 of the Constitution of India, 1950. The court said that Section 377 does not distinguish between consensual and involuntary sex, that is, the person chosen is not the person. This is a serious violation of Article 14. The court also ruled that Section 377 of the IPC violated freedom of expression as it prohibited people from expressing their homosexuality. Others argue that gender choice is part of self-esteem protected by the right to life and freedom. This is a critical decision and criticism of Kaushal's case is unfair and unnecessary. Scientists and biologists find discrimination based on homosexuality unacceptable because it is seen as a natural phenomenon. The Supreme Court's Decision dated 6 September 2019 and numbered is the beginning of the road to equality. This is just the first step in the fight against homophobia, which has existed in India for years. Although homosexuality was banned under Section 377 in the past, it is still not accepted in Indian culture. The country's laws continue to harm people. This is the result of a huge gap in the laws and judicial system of India regarding LGBT rights. At the same time, the stigma surrounding the idea continues to play an important role in holding back and influencing society.

### **Conclusion**

The main problem with legalizing same-sex marriage is that people are starting to oppose it in the name of various religions and cultures. At a hearing by Delhi HC, Attorney General Tushar Mehta said that same-sex marriage violates "our rights, our constitution, our society and our values". It took a disappointing 24 years for the Youth Freedom Movement, founded in 1994, to decriminalize homosexuality and allow people to freely love one another, making the value and the human body too rigid for just a few. The freedom to marry whoever you want. Religion and politics aside, the law should allow the LGBTQ community to register marriages under the Individual Marriage Act of 1954. Because of the importance of marriage in private law, no one can stand in the way of its recognition. and culture. However, the law will not accept the amendment that still requires marriage. The only way to solve this problem is to raise awareness and tell people that everyone has the right to choose a partner. Now is the time to fight for the equality, recognition and rights that the LGBTQ community.

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